

REMARKS

This Supplemental Response is filed to supplement the Amendment and Reply filed March 17, 2008. In the Official Action mailed July 9, 2008 the Examiner indicated that the March 17, 2008 Amendment and Response was not fully responsive the Official Action mailed December 20, 2007 in that the Amendment and Response did not address the nonstatutory obviousness-type double patenting rejection of paragraphs 14-15 of the action. Please consider the following in response to the nonstatutory obviousness-type double patenting rejection.

The Examiner rejected claims 1-2 and 4-7 on the ground of nonstatutory obviousness-type double patenting. Specifically, the Examiner rejected claims 1-2 and 4-7 as being unpatentable over claims 8 and 30 of U.S. Pat. No. 6,752,794 to Lockwood et al. in view of Ohmsted PCT '173 and Heaton PCT '127. Applicants respectfully request that the rejection be reconsidered in light of the amendment to the claims presented in the Amendment and Response of March 17, 2008. Applicants submit that claim 1, as amended, does not meet the standard of nonstatutory obviousness-type double patenting under the analysis of In re Vogel and Vogel, 164 USPQ 619, (CCPA 1970).

As amended, claim 1 recites, among other things, "at least one discrete opening exetnding through a top surface of the cover, wherein the at least one discrete opening is open at the top surface such that negative pressure is communicated to an undermined portion of the wound through the at least one discrete opening." Support for this amendment is found at least at page 4, lines 14-17; page 4 lines 23-24; page 5 lines 17-21; and figure 5 of the originally filed application.

Applying the analysis of In re Vogel, the first inquiry is whether "identically the same invention" is being claimed. Id at 621. The answer to the first inquiry is clearly no as the words

of the claims differ. For example, neither claim 8 nor claim 30 of Lockwood '794 recites "that negative pressure is communicated to an undermined portion of the wound." The court of In re Vogel explained that "[b]y 'same invention' we mean identical subject matter." Id. The court also explained that "[a] good test, and probably the only objective test, for 'same invention,' is whether one of the claims could be literally infringed without infringing the other." Id. at 622. Because Lockwood '794 does not recite "undermined portion" the scope of the claims is not "identical subject matter" as claim 1 of the instant application as required by In re Vogel. One could infringe claim 8 or claim 30 of Lockwood '794 in a wound not having an undermined portion. A structure as recited in claim 8 or claim 30 of Lockwood '794 used with a wound which lacks an undermined surface would not literally infringe amended claim 1 of the present application. Thus, the answer to the initial inquiry is no.

If the answer to the first inquiry is no, then the second inquiry of In re Vogel is "[d]oes any claim in the application define merely an obvious variation of an invention disclosed and claimed in the patent?" Id. This question cannot be answered using the disclosure of the patent in question as prior art. Id. The term "wound surface" as recited in claims 8 and 30 of Lockwood '794 does not read on "undermined portion" as recited in claim 1 of the present application. Each embodiment of Lockwood '794 discloses a wound contacting layer and a wound contacting surface with a cover placed over the wound contacting layer to form passageways. Only the wound contacting surface is disclosed as being in contact with any portion of the wound. For example, the embodiment shown in Figs. 17-22 includes a single wound contacting layer and the cover is not configured or positioned to contact any portion of the wound. Thus, no embodiment of Lockwood '794 discloses a member configured such that "at least one discrete opening extend[ing] through a top surface of the cover, wherein the at least

one discrete opening is open at the top surface such that negative pressure is communicated to an undermined portion of the wound through the at least one discrete opening.” Therefore, the term “wound surface” cannot be read to include an “undermined portion” of a wound.

The deficiency of Lockwood ‘794 is not cured by Ohmstede PCT ‘173 and Heaton PCT ‘127. Neither Ohmstede PCT ‘173 nor Heaton PCT ‘127 disclose “at least one discrete opening extending through a top surface of the cover, wherein the at least one discrete opening is open at the top surface such that negative pressure is communicated to an undermined portion of the wound through the at least one discrete opening.” In fact, Ohmstede PCT ‘173 and Heaton PCT ‘127 each fails to disclose an undermined wound structure. Thus, there is no teaching in the disclosures of Ohmstede PCT ‘173 and Heaton PCT ‘127 that would lead a person of ordinary skill in the art to find that the limitations of amended claim 1 are an obvious variation of claims 8 and 30 of Lockwood ‘794.

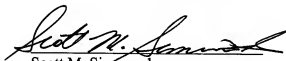
In fact, in the absence of an undermined wound, such a discrete opening would make the member unsuitable for its intended purpose. Such a discrete opening, in the absence of contact with a portion of an undermined wound, would provide an unimpeded flow path for the negative pressure flow thereby reducing the negative pressure at the actual wound surface. Because the negative pressure at the wound would be significantly reduced, if not eliminated, the structure recited in claim 8 and 30 would not adequately apply negative pressure to the wound surface. Thus, amended claim 1 is not an obvious variant of claims 8 and 30 of Lockwood ‘794 and is patentable without a terminal disclaimer. In light of the forgoing, withdrawal of the nonstatutory obviousness-type double patenting rejection is respectfully requested. Claims 2 and 4-7 each depend from claim 1 and the nonstatutory obviousness-type double patenting rejection of claims 2 and 4-7 should be withdrawn on at least this basis.

In view of the forgoing, it is submitted that this application is in condition for allowance. Allowance is respectfully requested. If the Examiner believes that a telephonic interview would expedite the allowance of this application, the Examiner is requested to contact the undersigned for prompt resolution of any outstanding issues.

It is respectfully requested that, if necessary to effect a timely response, this paper be considered as a Petition for an Extension of Time sufficient to effect a timely response and that shortages in fees, if any, be charged, or any overpayment in fees credited, to the Account of Barnes & Thornburg, Deposit Account No. 10-0435 with reference to file 7175-71858.

Respectfully submitted,

BARNES & THORNBURG LLP

A handwritten signature in black ink, appearing to read "Scott M. Simmonds", written over a horizontal line.

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